UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Plaintiff, v. JASON TODD KINDLE, Defendant.	2:05-cr-0073-RLH-LRL Motion to Suppress (#16)

REPORT & RECOMMENDATION

The defendant, Jason Todd Kindle, awaits trial on an Indictment charging him with Felon in Possession of a Firearm, *viz*., a Colt .22 caliber pistol, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The North Las Vegas Police (NLVPD) seized the pistol from the trunk of Kindle's car following a traffic stop on November 24, 2004. Before the court is Kindle's Motion to Suppress Firearm and Statements (#16), in which he challenges the legality of the automobile inventory search that led to the discovery and seizure of the Colt 22. Having considered the motion, the government's Response (#20), and the evidence and the arguments of counsel presented at the hearing on November 28, 2005, the undersigned submits this Report & Recommendation.

THE FACTS

Based on the testimony adduced at the hearing, the court finds the following facts. On the afternoon of November 24, 2004, between 4:30 and 5:00 p.m., NLVPD Off. Eric Newson effected a traffic stop on a Ford Tempo for failure to yield the right of way at the intersection

of Balzar Avenue and Martin Luther King Boulevard in North Las Vegas.[1] The sole occupant of the Tempo was the defendant, Jason Kindle, an African American male in his mid-30s. Although Kindle produced a valid driver's license, vehicle registration and proof of insurance, it appeared to Off. Newson that Kindle was "extremely nervous and anxious." In response to Newson's questions, Kindle said he had been living with his girlfriend on Paradise Valley Avenue for more than a year, and that when he was stopped he was on his way to the DMV office at Carey and Rancho. Newson asked why he was going this way, since it wasn't the most direct route to the DMV. Kindle explained he wanted to avoid the heavy rush-hour traffic on Lake Mead Boulevard (which, the court notes, would have been only a slightly more direct route). According to Off. Newson, the area through which Kindle had just driven, "Vegas Heights," was known for its gang and drug-related activity. Based on the foregoing, Off. Newson called for back-up. A short time later Off. Freeman arrived. Off. Newson directed Kindle to step out of his vehicle and move to the front of the patrol car, where Newson handcuffed him and patted him down for weapons. Kindle was unarmed. Newson asked whether there were guns or drugs in the car. Kindle said there were not. Newson asked whether Kindle would allow him to search the car. Kindle said he would not, because he was doing nothing wrong. Though Kindle was unarmed, Newson did not remove the handcuffs.

Approximately ten minutes later, in response to Newson's request for a records check, dispatch reported that Kindle was a convicted felon for assault on a police officer. Off. Newson noted that the address provided by dispatch at which he was currently registered was not the address at which he said he'd been living with his girlfriend, Angela Gardner, for more than a year. Consequently, Off. Newson formally arrested him for Ex-Felon Failure to Change Address and for Failure to Yield the Right of Way. As Newson was making arrangements to have Kindle's automobile towed to an impound lot, Kindle asked whether Newson could simply

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[1] Kindle does not contest the legality of the traffic stop.

release the car to Ms. Gardner. Newson said no because there wasn't enough time. At the hearing Newson explained that due to the high volume of calls received by patrol officers, the police try to handle each citizen contact as expeditiously as possible, and, if they can, spend no more than fifteen minutes on each call. Due to the heavy rush hour traffic, Newson believed that Kindle's girlfriend would be unable to respond to the scene and retrieve the car in such a short period of time. Hence, the car was towed. In preparation for the tow, Newson inventoried the vehicle's contents. In the trunk he found the Colt .22 that is the subject matter of this prosecution. After being given his *Miranda* warnings, Kindle admitted he bought the gun on the street for $200.

DISCUSSION

Kindle contends that the Colt .22 should be suppressed because the inventory search of his vehicle was constitutionally flawed.[2] Specifically, Kindle contends that Off. Newson

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[2] Kindle also complains that he had been subjected to an unlawful investigative detention. The court need not reach this question, because the court finds that during the period of the alleged unlawful detention nothing incriminating was seized or said. Nor can it be said that the seizure of the Colt .22 was the fruit of the alleged unlawful detention -- it was seized during an inventory search of Kindle's vehicle following a valid arrest. Moreover, as the government noted at oral argument, the detention was not "investigative." According to Off. Newson, the detention was solely for reasons of "officer safety." Nevertheless, Kindle's "detention" is troubling. The court recognizes that routine traffic stops are fraught with potential danger. Indeed, in *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977), the Supreme Court held that during a routine traffic stop a police officer may order a person out of an automobile and frisk that person for weapons if the officer reasonably believes that the person is armed and dangerous. The question is whether Off. Newson had a "*reasonable* belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed] the officer in believing" that Kindle was an armed and dangerous individual. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)(quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)(emphasis added)). The stop in this case took place in the daylight of the afternoon in a well trafficked area, not in the dead of night on a lonely road; Kindle, an African American male in his mid-30s, was the sole occupant of the vehicle; he had not disregarded Newson's directive to stop his vehicle; he was not hostile or aggressive or under the influence of drugs or alcohol; he neither made a suspicious move toward, nor refused to remove his hand from, any part of his clothing; nor did Newson see a weapon-like bulge in Kindle's clothing. In reality, Kindle was polite and cooperative, produced a valid driver's license, registration and proof of insurance, and answered Newson's questions. This was not a situation in which Off. Newson had pulled Kindle over because he suspected Kindle of engaging in criminal conduct, especially criminal conduct for which he would likely be armed. This was simply a routine traffic stop. The only reasons Newson offered for suspecting that Kindle was armed and dangerous were that Kindle appeared nervous, and had driven through a residential neighborhood which had

violated NLVPD's inventory policy in two respects: (1) he impounded Kindle's vehicle without first attempting to release it to Kindle's girlfriend, as Kindle had requested; and (2) his inventory of the contents of Kindle's vehicle failed to include every item of personal property that was in the vehicle. The government argues, in effect, that Newson substantially complied with the NLVPD inventory policy, and that suppression is therefore not required.

After effecting a lawful arrest, the police may conduct an inventory search of property in the arrestee's possession -- in this case an automobile -- without a warrant. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). An inventory search serves three purposes: "the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." *Id*. (citations omitted). Such a search is reasonable under the Fourth Amendment as a routine administrative caretaking function of the police, so long as it is not a subterfuge for a warrantless investigatory search without probable cause, *Florida v. Wells*, 495 U.S. 1, 3 (1990), and so long as it complies with "standardized criteria," *Colorado v. Bertine*, 479 U.S. 367, 375 (1987), or "established routine." *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983).

The police are not required to use the least intrusive means to secure the property in question. In *Illinois v. Lafayette*, the Illinois Appellate Court had held that the search of the defendant's shoulder bag was not a valid inventory search because the bag could easily have been secured by sealing it in a plastic bag and placing it in a secured locker. The Supreme Court observed:

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a significant crime problem. The court finds that on this basis alone it was not apparent that Kindle was armed and dangerous, especially after he was ordered out of the car, was handcuffed and frisked, and was found to be *unarmed*. Yet he remained handcuffed in the presence of two officers for at least ten minutes while the officers awaited a response to their request for a records check. *Compare United States v. Brown*, 273 F.3d 747, 748-49 (7th Cir. 2001); *United States v. Holmes*, 385 F.3d 786, 789-90 (D.C. Cir. 2004).

> Perhaps so, but the real question is not what could have been achieved, but whether the Fourth Amendment *requires* such steps; it is not our function to write a manual on administering routine, neutral procedures of the station house. Our role is to assure against violations of the Constitution.
>
> The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means.

Lafayette, 462 U.S. at 647 (emphasis in original)(quotation marks omitted).

Kindle complains that Off. Newson should have given Kindle's girlfriend, Angela Gardner, an opportunity to come to the scene and take possession of the vehicle, as Kindle had requested. A similar argument was rejected in *United States v. Kimes*, 246 F.3d 800 (6th Cir. 2001). There, the defendant argued that the arresting officers should not have towed his truck before calling the defendant's wife and asking her to come and pick it up. The court noted that the defendant "cite[d] no authority compelling such a conclusion, and we are aware of none." *Id.* at 805. Likewise in *United States v. Skillern*, 947 F.2d 1268 (5th Cir. 1991), the defendant contended that the officer's decision to impound the vehicle was unreasonable because he didn't ask the driver, who had been stopped for speeding and arrested for having no driver's license or proof of insurance, whether he wanted a passenger to take custody of the vehicle. *Id.* at 1270. Following *Colorado v. Bertine, supra*, the court rejected the argument. In *Bertine*, the Colorado Supreme Court had found a violation of the defendant's Fourth Amendment rights "because Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property" besides impoundment. *Colorado v. Bertine*, 479 U.S. at 373. The U.S. Supreme Court concluded "that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." *Id.* at 374. *See also United States v. Mayfield*, 161 F.3d 1143, 1144 (8th Cir. 1998). It is therefore apparent that the Fourth Amendment did not require Off. Newson to choose means less intrusive than impoundment to secure the vehicle.

Kindle nevertheless argues that Off. Newson's refusal to contact Ms. Gardner violated NLVPD's own policy regarding vehicle impounds. Section 9.34.00 of the NLVPD Policy Manual provides, among other things, that when the safekeeping of a vehicle is at issue due to the arrest of the vehicle's owner, "the officer will ascertain if a friend or relative is reasonably available to take custody of the vehicle.... If ... another is not reasonably available, the vehicle will be impounded for safe keeping." *See* Exhibit A, Manual at p. 9-44. Newson testified that he declined to contact Kindle's girlfriend because he believed it would take her too long during the rush hour to retrieve the car. In other words, it was Off. Newson's judgment call that Ms. Gardner was not "reasonably available to take custody of the vehicle." The court will not quarrel with Newson's judgment in that regard, especially since there is no evidence in the record that the decision to impound the vehicle was a subterfuge for a warrantless investigatory search. Accordingly, the court finds that Off. Newson's failure to contact Ms. Gardner did not amount to a violation of NLVPD's vehicle impound policy.

Kindle contends that Offs. Newson and Freeman further violated NLVPD's inventory policy by failing to include on the written inventory form every piece of personal property that was in the vehicle. The NLVPD's vehicle impound policy reads, in pertinent part: "It is the policy of this Department that whenever a vehicle is impounded, the officer will thoroughly search the vehicle and all containers within and make an inventory of *all* personal property on the appropriate NLVPD form." *See* Exhibit A, Manual at p. 9-43 (emphasis added).

Here, the inventory form, which is attached to the government's Response (#20) as Exhibit 2, lists a cell phone, front and back license plates, a crow bar, and a hammer, which, according to Off. Newson's testimony, are the only items he saw in the trunk. Newson admitted there was miscellaneous paperwork in the vehicle's console that was not, but should have been, listed on the inventory form. Ms. Gardner testified at the hearing that there were other items in the trunk as well, including a large flashlight, a set of jumper cables, three bottles of motor oil, and a bag of tools. Based on the foregoing, the court finds that it is likely that certain items

of personal property that were in the car were not listed on the inventory form. The failure to list "all personal property" within the vehicle constitutes a violation of the literal terms of the NLVPD policy. The question is whether under the circumstances of this case the officers' failure to list certain items of personal property in the car amounted to a violation of the Fourth Amendment. The court concludes it did not.

> Inventory searches are reasonable when they are conducted according to standardized police procedures. Compliance with procedures merely tends to ensure the intrusion is limited to carrying out the government's caretaking function. This does not mean that inventory searches are always unreasonable when standard procedures are not followed.

United States v. Mayfield, *supra*, 161 F.2d at 1145 (citations omitted)(court upheld inventory begun at scene but not completed as it should have been, where no bad faith by police and inventory search not pretext for general search).

In *United States v. Rowland*, 341 F.3d 774 (8th Cir. 2003), the police listed on the inventory form only those items they considered potential evidence. The court stated:

> [I]t is our opinion by failing to make a record of all property within the vehicle, law enforcement failed to follow its own procedures and thus did not conduct the search pursuant to "standardized police procedures." *Opperman*, 428 U.S. at 376 .... This is not dispositive, however.
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> Even when law enforcement fails to conduct a search according to standardized procedures, this does not mandate the suppression of the evidence discovered as a result of the search. *E.g.*, *United States v. Mayfield*, 161 F.3d 1143, 1145 (8th Cir. 1998). "Compliance with procedures merely tends to ensure the intrusion is limited to carrying out the government's caretaking function." *Id.* There must be something else; something to suggest the police raised "the inventory-search banner in an after-the-fact attempt to justify" a simple investigatory search for incriminating evidence.

United States v. Rowland, 341 F.3d at 780.

In *Rowand*, there was clear evidence the police used the inventory search as a subterfuge for a purely investigative search. Here, there is no evidence the police were attempting after the fact to dress an investigatory search in inventory search clothing. When Off. Newson learned

that Kindle had not re-registered as a convicted felon at his current residence in over a year, he formally arrested Kindle. Pursuant to standardized NLVPD policy, Newson called for a tow truck in order to impound Kindle's car. Before the car was towed, Newson undertook an inventory search, during the course of which he discovered a Colt .22 in the trunk. Although Newson may not have inventoried every item of personal property in the car, nothing in this record suggests that he conducted a general investigative search for incriminating evidence, or that he otherwise acted in bad faith. Suppression, therefore, is not required.

RECOMMENDATION

Based on the foregoing, it is the recommendation of the undersigned United States Magistrate Judge that Kindle's Motion to Suppress Firearm and Statements (#16) should be denied.

DATED this 3rd day of January, 2006.

LAWRENCE R. LEAVITT
UNITED STATES MAGISTRATE JUDGE